MAK WENG KIT

v.

REED EXHIBITIONS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[NOTICE OF ORIGINATING MOTION NO: R1-25-7-98]
8 DECEMBER 1999

LABOUR LAW: *Employment - Reassignment of position from country manager to area manager - Whether a demotion - Whether a claim for constructive dismissal*

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Decision of Industrial Court - Findings of facts - Whether irrational to warrant judicial review*

The claimant (the applicant herein) claimed constructive dismissal when he was reassigned from his position as country manager to that of International Sales Force area manager by the respondent. He claimed that the reassignment was a demotion. The Industrial Court held that the reassignment was not a demotion and therefore the claim of constructive dismissal which rested solely on the basis that he was demoted failed. Hence the instant application for *certiorari* to quash the decision of the Industrial Court.

The claimant argued that the Industrial Court was irrational in its finding when it held: (i) that the employer has the right to transfer employees and thereafter hold that the claimant did not contend that the respondent did not have a contractual right to transfer him or reassign him to different functions; (ii) that the claimant did not plead that the respondent had no contractual right to transfer or reassign him to different functions; (iii) that the claimant was only told to liaise with the general manager ('GM') when documentary evidence adduced in court showed that he was to report to the GM implying a demotion; and (iv) that the reassignment of the claimant was as a result of a proposed reorganisation. It was also argued that the Industrial Court misconstrued the *ratio decidendi* in the case of *Ang Beng Teck v. Pan Global Textiles Penang* and should have followed it. The Court of Appeal therein ruled in favour of the employee thereby upholding the decision of the tribunal court.

Held:

[1] The award of the Industrial Court provided under s. 33B of the Industrial Relations Act 1967 shall be final and conclusive and shall not be challenged, appealed against, reviewed or quashed or called in question

in any court, save on the grounds of illegality, irrationality or procedural impropriety. The court cannot disturb any findings of fact unless there is irrationality in the tribunal coming to such findings of facts.

[2] The claimant did not in fact challenge the contractual right of the respondent to transfer him. It was merely a statement of fact by the Industrial Court that the challenge was not to the contractual right of the respondent to transfer the claimant but to his reassignment being a demotion and taken contextually, there was no irrationality at all.

[3] There was nothing contained in the pleadings or in the evidence that the respondent had no contractual right to transfer him so the observation of the Industrial Court was an observation of fact. Transferability per se was not an issue here. The issue was whether the reassignment was a demotion and whether in the circumstances the claimant was constructively dismissed. The Industrial Court did correctly address itself on the matters related to that issue.

[4] The Industrial Court had addressed the issue on whether there was a demotion based on whether the claimant had to report to the GM in his new position. The President of the respondent had testified at length on this issue and the Industrial Court having heard and assessed his evidence in the context of the other evidence came to a finding of fact that the claimant was only required to liaise with the GM in his new position and that his new position was not a demotion. Where the Industrial Court has made findings of facts based on the credibility of witnesses, such findings of facts cannot be impugned in the judicial review in *certiorari* proceedings.

[5] The case of *Ang Beng Teck* concerned an employee who upon being found guilty on various charges of misconduct was subsequently punished with a reduction in rank at work. The employee did not walk out on his employment claiming constructive dismissal. He was terminated from his services upon his refusal to report for work. The Court of Appeal held that the Industrial Court therein addressed itself to the right issue, *ie,* whether the termination of his services was with or without justification, and not whether the employee's reduction in rank amounted to constructive dismissal. The Court of Appeal's statements on constructive dismissal were not part of the *ratio decidendi* of the said case. Thus, the Industrial Court herein could not be said to have misconstrued its *ratio decidendi*.

[6] The Industrial Court's finding that the designation of the claimant to the new post was as a result of a proposed reorganisation was made in relation

to the claimant's allegation that reassignment was as a result of the company's loss of confidence in him. The Industrial Court did not detract from the central finding that the claimant was not demoted.

[Application dismissed.]

Case(s) referred to:
Ang Beng Teck v. Pan Global Textiles, Penang [1996] 3 AMR 2941 ***(refd)***
Council of Civil Service Union & Ors v. Minister for Civil Service [1985] AC 374 ***(refd)***
Malayan Banking Bhd v. Association of Banking Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 ***(refd)***
Millbrook Furnishing Industries Ltd v. Mc Intosh [1981] IRLR 309 ***(refd)***
Minister of Home Affairs v. Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351 ***(refd)***
Reed Exhibition Companies v. Mak Weng Kit [1997] 3 ILR 1065 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 33B

For the applicant - LG Seah; M/s Lobo Assocs
For the respondent - A Ramadass; M/s Ramadass & Assocs

Reported by Usha Thiagarajah

JUDGMENT

KC Vohrah J:

The applicant (the claimant) claimed constructive dismissal when he was re-assigned from his position as country manager to that as International Sales Force (ISF) area manager by the respondent (the company) with effect from 24 January 1996. He claimed that the re-assignment was a demotion.

The re-assignment of his position was conveyed to the claimant by the company in a letter dated 23 January 1996. The claimant wrote a letter in reply requesting the re-assignment to be revoked on the ground that it was a demotion. The company wrote a letter to him dated 29 January 1996 which, *inter alia*, refuted the claimant's contention that he was demoted.

In the Industrial Court the court identified the sole issue as being "whether the re-assignment of the claimant's job function to the new position amounts to a demotion from his post as general manager."

The Industrial Court in its *Reed Exhibition Companies v. Mak Weng Kit* [1997] 3 ILR 1065 held that the re-assignment of the position of the claimant as

country manager to ISF area manager was not a demotion and that therefore the claim of constructive dismissal, which rested solely on the basis that he was demoted, failed.

It is established that the High Court when considering judicial review for the grant of *certiorari* does not act as a court of appeal. The court may exercise control by judicial review of administrative action on the ground of "illegality", "irrationality" or "procedural impropriety" (see *Council of Civil Service Union & Ors v. Minister for Civil Service* [1985] AC 374 and *Minister of Home Affairs v. Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351).

In this case I must firmly assert that this High Court does not sit as a court hearing an appeal from a subordinate court. This court sits mindful that the award of the Industrial Court as statutorily provided under s 33B of the Industrial Relations Act 1967 shall be final and conclusive and shall not be challenged, appealed against, reviewed or quashed or called in question in any court, save on the grounds I mentioned earlier. The court cannot disturb findings of facts unless there is "irrationality" in the tribunal coming to such findings of facts, "irrationality" understood in the sense of "Wednesbury unreasonableness" (see *Council of Civil Service Union* at 411 and 414). In the pithy language of that great legal jurist Abdoolcader SCJ in *Malayan Banking Bhd v. Association of Banking Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 at p 206:

> The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision maker's jurisdiction, **unless** the decision maker has reached **absurd results or reached results absurdly**.

Using other language but with similar purport Abdoolcader SCJ at p. 207 held the decision of the Industrial Court "was clearly perverse and so devoid of plausible justification that no reasonable body or person could have reached it."

Bearing these judicial pronouncements in mind I approach the claimant's 1st ground for judicial review which is that the court was irrational in its finding when it held on the one hand that "it is well settled that the employer has the prerogative to transfer the employer from one post to another, from one department to another, from one branch to another and from one company to another within the organisation" and yet on the other hand went on to state in the next paragraph that it is "however pertinent to note that neither in the pleadings nor during the evidence did the claimant contend that the company did not have the contractual right to transfer him or to reassign him to different function..."

But whatever was stated by the Industrial Court, as has been pointed by counsel for the company, has to be viewed in the context of what the court further stated:

> It is also not the claimant's contention that he had been victimised or that the reassignment was *mala fide*. **His only complaint is that the re-assignment amounts to a demotion**. (emphasis added)

Counsel for the claimant argued that the term "prerogative" as used by the Industrial Court refers to the **implied** rights of the employer to transfer his employees and it is therefore irrational for the court to state in the next paragraph that the claimant did not contend that the company did not have a contractual right to transfer him or to reassign him to different functions. I frankly fail to see any merit in that argument. The claimant did not, in fact, challenge the contractual right of the company to transfer him. It was merely a statement of fact by the Industrial Court that the challenge was not to the contractual right of the company to transfer the claimant but to his re-assignment being a demotion and taken contextually there is clearly no irrationality at all.

The 2nd ground is also predicated on alleged irrationality in that the court made an error of fact when it accepted that the claimant did not contend either in evidence or pleading that the company did not have the contractual right to transfer him when there was evidence contained in an exhibit (exh. C2) to show that. It was argued that there was irrationality as the Industrial Court had acted on "an incorrect basis of fact" for holding that the applicant "did not plead that the company had no contractual right to transfer or re-assign him to different function..." when in fact the applicant in paras. 3.1, 3.2. 3.3 and 3.4 of the amended statement of case and in the exhibits annexed thereto had challenged the company's re-assignment of his position to that of ISF area manager as amounting to a demotion.

To be noted is that in the amended statement of case, there is nothing contained within the body of the pleadings or in the evidence that the company had no contractual right to transfer him so the observation of the Industrial Court is an observation of fact. Transferability per se is not an issue in the case.

What matters is that the Industrial Court was seised of the pivotal issue in the case — whether the re-assignment was a demotion and therefore in the circumstances of the case the claimant was constructively dismissed – and the court did correctly address itself on the matters that are related to that issue. That brings me to the 3rd ground of complaint.

The 3rd ground is that the court had committed "an error of fact" and had acted on an incorrect basis of fact when it held that the claimant was only told to "liaise" with the general manager contrary to the documentary evidence adduced in the court which showed that the claimant was "to report" to the general manager. In other words there was a demotion for him in the re-assigned post if he had to report to the new general manager and he himself was the general manager immediately before the re-assignment.

The documentary evidence (exh. C3) referred to has this passage on which the claimant relies:

> In line with our regional strategy to develop the regional markets, we will be organising the Malaysian office to reflect this business decision. In view of that, we would like to confirm our offer to re-assign your job function to that of an ISF Area manager for Malaysia with effect from January 24, 1996. Your prime responsibility is to focus on improving intra-regional sales for our non-core group of events in this region. You will report to Steven Thong, General Manager on the day-to-day matters and you are to work closely with Monica Cheng on ISF related issues.

The second letter to the claimant by the company also mentioned "you may be required" to report to Steven Thong "on day to day matters, which are now a part of his job responsibilities ..."

But as was pointed out by the counsel of the company and, I agree with the view, the Industrial Court had in fact addressed the said issue after hearing the evidence of the author of the abovesaid letter, *ie*, one Mr. Jimmy Lau, the president of the company, who was COW1 in the Industrial Court proceedings. He had testified at length on this issue and the Industrial Court having heard and assessed his evidence in the context of the other evidence was convinced and came to a finding of fact that the claimant was only required to liaise with Mr. Steven Thong in his new position and that his new position was not a demotion. The evidence of Mr. Lau was backed by the evidence of the non executive chairman of the company, Dr. Mohd. Tajuddin Mohd. Jali, and showed that the claimant's re-assigned position was separate and distinct from the general manager's position. It is clearly established in law that where the Industrial Court has made findings of facts based on the credibility of witnesses it saw and heard such findings of facts cannot be impugned in the judicial review in *certiorari* proceedings. The 3rd ground has no merit.

The 4th ground advanced by the claimant is that the Industrial Court committed an error of law when it misconstrued the *ratio decidendi* in the case of *Ang Beng Teck v. Pan Global Textiles, Penang* [1996] 3 AMR 2941 on statutory unjust dismissal as opposed to common law constructive dismissal.

In *Ang Beng Teck* reference was made to the Supreme Court case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45. In *Wong Chee Hong* Salleh Abas LP observed as follows at 49:

> Thus it is clear even in England, "constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled Industrial Relations. Such a proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier and goes no further. Alternative expressions with the same meaning, such as "implied dismissal" or even "circumstantial dismissal" may well be coined and used. But all these could not go beyond the common law test.

Salleh Abas LP further stated:

> When the Industrial court is dealing with a reference under section 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concept to the U.K. legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from paragraph (c) of section 55(2) of the U.K. Protection of Employment Act 1978. Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in U.K. should be introduced as an aid to the interpretation of the word "dismissal" in our section 20. We think that the word "dismissal" in our section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty ot a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486.

According to the claimant the Court of Appeal in *Ang Beng Teck* rejected the common law test and that the Industrial Court should have followed the *ratio decidendi* in *Ang Beng Teck*.

The material facts of the Court of Appeal in *Ang Beng Teck* themselves were not concerned with "constructive dismissal" but with "termination". It was a case of an employee who upon being found guilty on various charges of misconduct was subsequently punished with a reduction in rank at work. Upon the meting out of the said punishment the employee refused to report for work but insisted that he be restored to his previous position. The employee in that

case **did not walk out** on his employment claiming constructive dismissal. It was upon his refusal to report for work that he was subsequently terminated from his services by his employer. The employee then filed a complaint of unjust termination when he was so terminated. So when the matter arose before the Court of Appeal, the Court of Appeal clarified the point that the facts of the case were on termination by the employer and not on constructive dismissal. The Court of Appeal decided the dispute in favour of the employee thereby upholding the decision of the Industrial Court. The Court of Appeal held that the Industrial Court addressed itself to the right issue, not whether the employee's reduction in rank amounted to constructive dismissal but whether the termination of his services was with or without justification. The Court of Appeal's statements on constructive dismissal are not really part of the *ratio decidendi* of the case. Thus the Industrial Court therefore cannot be said to have "misconstrued the *ratio decidendi*" of *Ang Beng Teck* as alleged by the claimant when *Ang Beng Teck* is not concerned with constructive dismissal.

I again see no merit on the ground advanced.

As regards the 5th ground, it is that the Industrial Court had asked itself the wrong question when it held that "the court is of the considered opinion that the designation of the claimant to the new post was proper, done *bona fide* as a result of a proposed reorganisation ..." when "such intentions are irrelevant at law." In argument the case of the U.K. Employment Appeal Tribunal, *Millbrook Furnishing Industries Ltd v. Mc Intosh* [1981] IRLR 309 was relied upon.

It has to be noted that the claimant himself did allege that the re-assignment was as a result of the company's loss of confidence in him. In other words he was reassigned not because there was a reorganisation exercise. The court's finding was an answer to that and while it was not in issue the court's finding did not detract from the central finding that the claimant was not demoted.

The application of the claimant is dismissed with costs.